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In The

Supreme Court of the United States

October Term, 1976

No. 76-374

LEATHA BENITA SIMS, by her next friend and Mother, Linda Gail Sims,

Petitioner,

vs.

WILLIAM WALN and MAX LAUNDER,

Respondents.

PETITION OPPOSING WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALFRED J. WEISBROD
ALFRED J. WEISBROD Co., L.P.A.
107 W. Main Street
Troy, Ohio 45373
Attorney for Respondents

COCKLE PRINTING COMPANY, 1823 St. Mary's Avenue, Omaha

INDEX

	Pages
Statement of the Case	1
Statement of Facts	3
Reasons for Denying the Writ	5
1. Cruel and Unusual Punishment	5
2. Deprivation of Liberty Without Due Process of Law	8
3. Parental Rights	10
Conclusion	12

CASES CITED

Bramlet v. Wilson, 495 F. 2d 714 (8 Cir. 1974) 6

Furman v. Georgia, 408 U. S. 238 (1972) 7

Glaser v. Marietta, 351 F. Supp. 555 (W. D. Pa. 1972) 6, 9, 10, 11

Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973) 5, 9, 10, 11

Goss v. Lopez, 419 U. S. 565 (1975) 9

Ingraham v. Wright, 498 F. 2d 248 (5th Cir. 1974) 6, 7, 9

Jackson v. Bishop, 404 F. 2d 571 (8 Cir. 1968) 6

Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) 11

Negrich v. Hohn, 246 F. Supp. 173, 176 (W. D. Pa. 1965) aff'd. 379 F. 2d 213 (3rd Cir.) 5

Nelson v. Heyne, 491 F. 2d 352 (7th Cir. 1974) 6, 7

CASES CITED—Continued

Pages

Pierce v. Society of Sisters, 268 U. S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1924) 11

Powell v. Texas, 392 U. S. 514, 531-532, 88 S. Ct. 2145, 20 L. Ed. 1254 (1968) 5

Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1943) 11

Sims v. Bd. of Ed., 329 F. Supp. 678 (D. N. M. 1971) .. 6, 9

Ware v. Estes, 328 F. 2d Supp. 657-659 (N. D. Tex. 1971) aff'd. per curiam, 458 F. 2d 1360 (5th Cir. cert. denied 409 U. S. 1027 (1972) 6, 11

Zwick v. Freeman, 373 F. 2d 110, 119 (2d Cir. 1967) 6

STATUTES CITED

Title 42 of the United States Code, Sections 1983 and 1985 (3) 1

Section 3319.41 of the Ohio Revised Code 2, 5, 8, 10

CONSTITUTION CITED

Eighth Amendment, United States Constitution .. 2, 5, 6, 7, 8

Fourteenth Amendment, United States Constitution 2

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STATEMENT OF THE CASE

This case is an action brought under Title 42 of the United States Code, Sections 1983 and 1985 (3). The case was originally filed in the United States District Court for the Southern District of Ohio, Western Division.

Leatha Benita Sims, by her next friend and mother, Linda Gail Sims filed suit against the Defendan . William Waln and Max Launder, principal and vice-principal of Schaefer Junior High School, Springfield, Ohio. The basis of this cause of action was to recover damages for alleged injuries inflicted by the Defendants on the Plaintiff when she was allegedly manhandled in Defendant Waln's office. There is no dispute over the fact that no corporal punishment was ever inflicted in this case.

In addition, the action seeked redress for alleged deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States and by acts of Congress providing for equal rights of citizens. It is alleged that the Defendants acted under authority of Section 3319.41 of the Ohio Revised Code which authorizes corporal punishment. Plaintiff complains that the above section of the Ohio Revised Code is unconstitutional on its face under the Eighth and Fourteenth Amendments to the United States Constitution.

The case was tried before the Honorable Judge Carl Rubin and after a full trial and hearing of the facts the opinion of the Court was filed in favor of the Defendants and against the Petitioner. The case was then appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the decision of the United States District Court for the Southern District of Ohio, Western Division.

STATEMENT OF FACTS

Leatha Benita Sims was a student at Schaefer Junior High School in Springfield, Ohio. At the time of the alleged incident Miss Sims was thirteen years old. William Waln and Max Launder are the principal and assistant principal, respectively, of Schaefer Junior High School and held those positions at the time of the alleged incident.

The facts are uncontroverted that Leatha Sims was a problem child for the administrators of Schaefer Junior High School for some time. She was continually tardy and involved in other student problems. As a result, disciplinary action had been taken against her on more than one occasion. In fact, on one occasion she had been paddled with the approval of her mother, Linda Gail Sims. On May 13, 1973, Leatha Sims was again tardy. As a result, Principal Waln told Leatha Sims that she would have to remain after school for detention. When it was time for detention Miss Sims came to the principal's office and advised that she could not remain for detention because she had to babysit for her sister. Mr. Waln told Leatha that she could go home to babysit upon verification. Leatha was unable to provide verification. As a result, Mr. Waln told Miss Sims that she would have to serve her detention.

Leatha Sims refused to serve the detention and said that she was going to leave anyway. At this time she was given the option by Mr. Waln to either serve detention or take two "cracks". Miss Sims after considering the matter refused to stay for detention. Therefore, Mr.

Waln attempted to administer "cracks". The facts are clear that he was unable to administer any of the "cracks". As a result, Miss Sims was never paddled. Mr. Waln did grab Miss Sims to stop her from leaving the room in an effort to administer the corporal punishment and in this confusion Miss Sims slipped and fell.

After Miss Sims slipped, she left the room and proceeded home. Miss Sims' testimony is that she did not act any differently when she left the principal's office than she would have on any other occasion. That there was nothing unusual about the manner in which she left the building. Upon returning home the evidence becomes conflicting. She testified at trial that she was going to meet her mother to go to the library, not to babysit. This is evidently the reason that she was unable to obtain verification of the babysitting story. It, therefore, appears from facts that Miss Sims is just an insubordinate student. The fact remains that on May 14, 1973, Miss Sims received absolutely no discipline from Mr. Waln or Mr. Launder regarding the insubordination.

Plaintiff's brief is full of District Court testimony and an interpretation of that testimony in a manner most favorable to the Plaintiff. This is to be expected in light of Plaintiff's position in this case. However, Defendants will not, in this statement of facts, go into a discussion of the District Court trial and the testimony that is a part of the record.

REASONS FOR DENYING THE WRIT

The Court of Appeals concluded that "the Plaintiff was not subjected to corporal punishment during the incident in question." There were no facts presented at the trial to indicate that this case presents a vehicle to challenge Section 3319.41 of the Ohio Revised Code.

Every case must be tried on its facts. If the Supreme Court begins allowing attorneys to file cases in the courts of this land without requiring them to put witnesses on the witness stand who can testify to facts that set up the allegations contained in their complaint, then the courts are open to every type of speculation. No law can be challenged in the courts without sufficient facts to present an issue. In this case there was simply no corporal punishment.

1. Cruel and Unusual Punishment

Petitioner in her brief argues that corporal punishment violates the Eighth Amendment prohibition against cruel and unusual punishments *per se* and as applied. It should be pointed out that several courts, including the District Court and the sixth Circuit Court of Appeals below have held that the Eighth Amendment prohibition of cruel and unusual punishments applies only to situations of criminal punishment judicially imposed and that, therefore, the Eighth Amendment does not prescribe the infliction of corporal punishment on a student by school personnel. See *Gonyaw v. Gray,* 361 F. Supp. 366 (D. Vt. 1973); see, also, *Powell v. Texas,* 392 U. S. 514, 531-532, 88 S. Ct. 2145, 20 L. Ed. 1254 (1968); *Negrich v. Hohn,* 246 F. Supp. 173, 176

(W. D. Pa. 1965) *aff'd.* 379 F. 2d 213 (3rd Cir.); *Zwick v. Freeman,* 373 F. 2d 110, 119 (2d Cir. 1967).

However, several courts have also discussed the issue of whether corporal punishment constitutes a *per se* violation of the Eighth Amendment's Cruel and Unusual Punishments Clause. All of the decisions discovered, dealing with the issue as it relates to school authority, have held that no *per se* violation of Eighth Amendment standards exist. *Ware v. Estes,* 328 F. 2d Supp. 657-659 (N. D. Tex. 1971) *aff'd.* per curiam, 458 F. 2d 1360 (5th Cir. *cert. denied* 409 U. S. 1027 (1972); *Glaser v. Marietta,* 351 F. Supp. 555 (W. D. Pa. 1972); *Sims v. Bd. of Ed.,* 329 F. Supp. 678 (D. N. M. 1971); *Ingraham v. Wright,* 498 F. 2d 248 (5th Cir. 1974); *Nelson v. Heyne,* 491 F. 2d 352 (7th Cir. 1974).

Petitioner relies only upon "analogous circumstances" in her attempt to reach the conclusion that corporal punishment is unconstitutional *per se.* The case of *Jackson v. Bishop,* 404 F. 2d 571 (8 Cir. 1968) held that the whipping of Arkansas penitentiary inmates constituted prescribed cruel and unusual punishment. *Bramlet v. Wilson,* 495 F. 2d 714 (8 Cir. 1974), only states that there is a basis for a suit under the Civil Rights Act and that in that particular case the complaint was sufficient to state a claim. Without a discussion of the facts in *Bramlet* it is easy to distinguish the case at bar from that particular situation. In the case at bar there was no corporal punishment. The conclusion of the Petitioner, based solely on the authorities cited, is simply too tenuous to question the authorities previously discussed, each of which consider the precise issue of the constitutional validity of the use of corporal punishment on students by school personnel, and held that no violation exists.

Petitioner also relies on the case of *Furman v. Georgia,* 408 U. S. 238 (1972). *Furman* is the Supreme Court decision which considered the issue of whether capital punishment constituted a violation of the Eighth Amendment prohibition against cruel and unusual punishments. Since that case resulted in a five to four decision, with nine separate opinions, one by each justice, totaling some 138 pages, this writer will not attempt to synopsize the Court's opinions as they consider the Cruel and Unusual Punishment Clause. However, Petitioner has done so in the following statement found on page 9 of her brief:

> ". . . But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought to be justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be potently excessive and cruel and unusual punishment violative of the Eighth Amendment." 408 U. S. at 312.

Assuming that the quoted language is intended to relate the *Furman* opinions to the instant matter, it is asserted that at least some of the justices would be extremely surprised to find that their opinions in *Furman* dealing with the issue of capital punishment in a criminal setting, are being cited for the proposition that corporal punishment of school children is a *per se* violation of the Eighth Amendment. It should also be noted that in *Ingraham v. Wright,* supra, the Fifth Circuit relies on two of the opinions in *Furman* in holding that corporal punishment in schools is not a *per se* violation of the Eighth Amendment.

Nor is Petitioner's reliance on *Nelson v. Heyne,* supra, persuasive to establish that corporal punishment in schools constitutes a *per se* violation of the Eighth Amendment. The Seventh Circuit did find that beatings of 12-18 year old correctional institution inmates, and injection of tranquilizing drugs without adequate medical guidance and prescription did constitute cruel and unusual punishment. However, the Court also specifically distinguishes the factual situation of corporal punishment of school students and specifically indicates its agreement with an Indiana Supreme Court decision holding that a public school teacher may administer corporal punishment. The Court states: "The law appears to be well settled in both state and federal jurisdictions that school officials do not violate Eighth Amendment prescriptions against cruel and unusual punishment where the punishment is reasonable and moderate."

It is thus apparent that the claim that Section 3319.41 of the Ohio Revised Code violates *per se* the Eighth Amendment prohibition against cruel and unusual punishments must fail. No authorities holding *contra* have been discovered.

2. Deprivation of Liberty Without Due Process of Law

First of all let it be said that the Petitioner's amended complaint in the lower court at no time alleged any lack of due process of law on behalf of the Defendants in this case. I suppose the issue is raised in a continuing stab in the dark in hopes of giving the court some legal issue to hang its hat on. The facts presented at trial in this case represent one of the most meager efforts that this attorney has seen in more than seven years of trial practice.

Petitioner relies on the decision of *Goss v. Lopez,* 419 U. S. 565 (1975) to argue that "corporal punishment, if permissible, must be proceeded by at least that level of due process of law which the court imposed on ten (10) days suspensions of school children." The cases cited by the Defendant have no application in fact to the facts presented in the case at bar. Petitioner cites no cases holding that the imposition of corporal punishment by school personnel on pupils requires notice, hearing or representation. On the contrary, the courts in *Gonyaw v. Gray,* supra; *Glasser v. Marietta,* supra; and *Sims v. Bd. of Ed.,* supra, all held that the formalities generally associated with procedural due process would be inappropriately applied to the imposition of corporal punishment in schools. The court in *Gonyaw v. Gray,* supra at page 371, referring to corporal punishment in schools, stated simply: "in any event, it is a sanction which simply is not serious enough to require the prerequisite of a formal hearing."

The issue is before the Court as to "severe: corporal punishment" in *Ingraham v. Wright,* supra. It should be noted that *Ingraham* involved a situation where there was, in fact, corporal punishment.

A distinction must be made from other cases where corporal punishment is involved and this case where there is a real question as to whether or not the Court even has jurisdiction over action taken by an educator which is not in the corporal punishment area. It must be remembered that there was no corporal punishment administered in the case at bar.

3. Parental Rights

Petitioner apparently claims that the right of parents to raise their offspring according to their own precepts is a fundamental right, which leads to the conclusion that the imposition of corporal punishment without parental consent is a violation of such right.

Petitioner refers to the case of *Glaser v. Marietta,* supra. The essence of that holding was that the local school district could enforce its rules on corporal punishment, except as to a child whose parents had notified school officials that such disciplinary method is prohibited. However, the precedential value of the *Glaser* decision is weakened significantly by the court's reliance on the specific facts there in existence. As is stated in the footnotes to the later decision in *Gonyaw v. Gray,* supra, at page 367:

> "While the basis of this latter conclusion is not entirely clear, it should be noted that the underlying Pennsylvania statute authorizes school officials merely to 'exercise the same authority . . . over the pupils . . . as the parents . . . may exercise over them.'"

It should be apparent that the Ohio statute at issue specifically conveys to certain persons under certain circumstances the authority to inflict reasonable corporal punishment. Such a statutory difference would appear to be a critical factor distinguishing cases involving Section 3319.41 of the Ohio Revised Code from the *Glaser v. Marietta* holding. In light of the fact that this child had previously been paddled after notification and approval by her mother, the *Glaser* opinion loses considerable value as a precedent.

The court seems to be balancing the interest claimed by the parents in being able to raise their children in the manner desired, against the claims of the state for the need to assure order and discipline in the schools. The *Glaser* decision merely gave a judicial stamp of approval to the system already in use.

In *Gonyaw v. Gray,* supra, the court applies a very similar test, but with opposite results. The court cites *Meyer v. Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), for the proposition that the state cannot unreasonably interfere with the right of parents to direct the upbringing of their children. The court also recognizes that the parental right is not without some limitation, citing *Prince v. Massachusetts,* 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1943). The court concludes that the issue becomes whether the authorization of corporal punishment is reasonably related to the legitimate purpose of school discipline, citing *Pierce v. Society of Sisters,* 268 U. S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1924). The court concludes that the test is met and that no parental rights of plaintiffs therein have been violated.

The same type of balancing test is carried out in *Ware v. Estes,* supra, and the court has no trouble upholding the right of school officials to utilize corporal punishment in the face of parental objections.

The conclusion seems clear that the courts will attempt to weigh the interests asserted by the state against those propounded by parents of individual children. The results of such a balancing of interests test has favored the parental rights only in *Glaser,* supra, where there was

really no balancing required. In the other cases cited, the state interest is recognized and no constitutional violation is held to be shown.

CONCLUSION

The case at bar does not present facts sufficient to resolve a significant constitutional issue such as the question of cruel and unusual punishment through corporal punishment in the public schools of our land. Based upon the facts presented at trial wherein the Petitioner could show no corporal punishment it does not appear possible that a Writ of Certiorari could be granted.

Respectfully submitted,

ALFRED J. WEISBROD
ALFRED J. WEISBROD Co., L.P.A.
107 W. Main Street
Troy, Ohio 45373
Attorney for Respondents